In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-112

GEORGE SERIAN GEBHART, DAVID FLEMING WHITFIELD, AND HAROLD CORDELL SMITH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on May 7, 1971 (Pet. App. C). A petition for rehearing was denied on June 24, 1971 (Pet. App. D). The petition for a writ of certiorari was filed on July 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavit involved here failed to demonstrate probable cause for issuance of a warrant to search the Latin Quarter, a bingo house in Wilder, Kentucky.

2. Whether the prosecution of petitioners was the result of selective discrimination in enforcement of the underlying statute in violation of the Due Process Clause of the Fifth Amendment.

STATEMENT

After a trial by jury in the United States District Court for the Eastern District of Kentucky, petitioners were convicted of conspiring to use the facilities of interstate commerce to promote gambling, in violation of 18 U.S.C. 1952(a)(3) and (b). Each was sentenced to imprisonment for a year and a day (App. 13–18, 23–29).[1] The court of appeals affirmed (Pet. App. B).

The sufficiency of the evidence to sustain the convictions is not questioned. The evidence was that petitioners from 1964 to 1967 had managed a game of bingo on a large scale at the "Latin Quarter" near Newport, Kentucky, ostensibly for the benefit of a charity. During this period they had ordered a variety of bingo equipment from "Bingo King," a company in Englewood, Colorado; the orders were filled through the United States mails and by air freight. At the time of a raid on the Latin Quarter, conducted by F.B.I.

[1] "App." refers to defendants' appendix in the court of appeals, which the government is lodging with the Clerk of this Court.

agents pursuant to a search warrant issued by the U.S. Commissioner on March 1, 1968, a large quantity of the materials and equipment seized bore marks identifying them as originating with this Colorado company (Pet. App. 19).

ARGUMENT

1. Petitioners challenge here the validity of the March 1, 1968 search warrant on the ground that the affidavit of F.B.I. Special Agent John M. Barry, on which the warrant was based, contained no precise dates when the equipment was allegedly shipped interstate and failed to specify what interstate facility was used. The contention was never raised on petitioners' pre-trial motions to suppress evidence, in which they objected to the same affidavit on separate grounds,[2] and thus was never presented to the trial

[2] In the pre-trial suppression motions, petitioners Smith and Gebhart contested the validity of the search warrant essentially on grounds that the affidavit involved here failed to state the commmission of an offense against the United States and that the warrant itself improperly described the premises (App. 8–12). Petitioner Whitfield filed no motion to suppress. At the hearing on the motions, no contention was made that the affidavit was inadequate to sustain the issuance of the search warrant because it failed to specify the dates of, and the interstate facilities used for, interstate shipments (App. 32–48). Rather, the assertion was that the Bingo King trademark on bingo cards and the reference to Globe Ticket Company, Philadelphia, on the coupon tickets "are the only two references at all to any interstate shipment and certainly don't indicate any interstate travel, and I think in view of that, the affidavits having in no sense any personal knowledge of Mr. Barry, but being based solely on hearsay, are insufficient in addition to the fact that the property is not the property described" (App. 48). The trial court denied the motions (App. 12, 48–54).

court. At all events, the claim is insubstantial and does not warrant review by this Court.

The affidavit of F.B.I. agent Barry (Pet. 4–7) states that he was assigned to investigate possible interstate gambling operations in the State of Kentucky, "particularly the conduct of gambling operations at the Latin Quarter, 10 Licking Pike, Wilder, Kentucky" (Pet. 4). It shows that, on various named dates, he and F.B.I. Agent Lutes had entered the Latin Quarter, which has a large bingo room, a bar area and a room off the bar, had purchased bingo cards at $1.50 each, and had played numerous games of bingo. The cards, carrying the name of the Latin Quarter and a printed sketch of its building, bore the trademark of Bingo King, Englewood, Colorado. According to the affidavit, each player obtained, with the card, duplicate coupons for drawings on subsequent nights; printing on the coupons indicated that they were printed for the Latin Quarter by the Globe Ticket Company, Philadelphia. On the basis of these facts, affiant stated that he had "probable cause to believe that facilities in interstate commerce to wit: mails, and air freight, were used and are being used to carry on gambling operations in violation of the laws of the State of Kentucky, at the Latin Quarter * * *, in violation of Section 1952 of Title 18, United States Code * * *" (Pet. 6).

Affidavits for search warrants, "normally drafted by nonlawyers in the midst and haste of a criminal investigation," are to be read by magistrates and the courts "in a commonsense and realistic fashion," with-

out regard to "[t]echnical requirements of elaborate specificity once exacted under common law pleadings * * *." *United States* v. *Ventresca*, 380 U.S. 102, 108; *United States* v. *Harris*, No. 30, October Term, 1970, decided June 28, 1971. Such a reading of the affidavit here in question indicates clearly that the affiant had witnessed an extensive gambling operation, being carried on in defiance of federal law. His failure to designate precise dates of interstate shipments does not detract from his conclusion concerning probable cause. There can be no real question in this case that the alleged shipments took place prior to the issuance of the search warrant and that probable cause thus existed on the date of issuance. Cf. *Sgro* v. *United States*, 287 U.S. 206.[3]

2. Petitioners claim that they were denied due process under the Fifth Amendment because they, and other bingo-game operators in the same area, had been singled out for prosecution under a statute that allegedly had not previously been enforced by the federal government (Pet. 16).[4] They rely on *Yick Wo* v. *Hopkins*, 118 U.S. 356, which involved a discrimina-

[3] Petitioners' suggestion that this case is controlled by *Rosencranz* v. *United States*, 356 F. 2d 310 (C.A. 1), on the ground that the interstate shipments involved here may have occurred prior to September 13, 1961, the effective date of the statute (18 U.S.C. 1952) under which petitioners were prosecuted, is wholly unfounded. The affidavit reveals plainly that the bingo cards and the duplicate coupons had both been printed out of state for explicit use of the Latin Quarter, and the Latin Quarter was not in operation before 1964.

[4] See, however, *Dillon* v. *United States*, 391 F. 2d 433 (C.A. 10), certiorari denied *sub nom. Duggar* v. *United States*, 393 U.S. 825.

tory denial by a San Francisco board of supervisors of its consent to Chinese applicants seeking permission to operate laundries in non-fireproof buildings. In that case, however, the Court found that the conclusion was irresistible that the reason for such action was hostility to members of a particular race. It was this element of intentional or purposeful discrimination that constituted a violation of constitutional rights. And see, *Snowden* v. *Hughes,* 321 U.S. 1, 8–9; *Oyler* v. *Boles,* 368 U.S. 448, 456; *Powell* v. *Power,* 436 F. 2d 84, 88 (C.A. 2); *United States* v. *Sacco,* 428 F. 2d 264 (C.A. 9), certiorari denied, 400 U.S. 903; *Newman* v. *United States,* 382 F. 2d 479, 480–481 (C.A.D.C.); *Moss* v. *Hornig,* 314 F. 2d 89, 92–93 (C.A. 2); *United States* v. *Rickenbacker,* 309 F. 2d 462, 464 (C.A. 2), certiorari denied, 371 U.S. 962. But here, there is no evidence of such purposeful discriminatory action. Petitioners' gambling establishment was one of five that were raided the same night. All the operations employed the same method of gambling techniques; all those arrested were indicted; and all the cases were successfully prosecuted. The claim of "selective" prosecution is thus wholly without basis and warrants no further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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